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No. 08-497

In the Supreme Court of the United States

AMERISOURCE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's seizure of personal property for use as evidence in a criminal matter effected a taking requiring just compensation under the Fifth Amendment when the property was associated with criminal activity but its owner was not involved in that criminal activity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 525 F.3d 1149. The opinion of the Court of Federal Claims (CFC) (Pet. App. 19a-42a) is reported at 75 Fed. Cl. 743.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a) was entered on May 1, 2008. A petition for rehearing was denied on July 21, 2008 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on October 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Anita Yates and Anton Pusztai were principals of Norfolk Pharmacy (Norfolk) in Weirton, West Virginia.

On July 27, 2000, they were indicted by a federal grand jury in Alabama. Pet. App. 21a. They were charged with, *inter alia*, conspiring to defraud the United States; dispensing misbranded pharmaceuticals; operating an unregistered drug facility; and conspiring to commit money laundering. See *id.* at 3a, 21a; Gov't CFC App. 70-73.

A few days later, petitioner—a wholesale distributor of pharmaceuticals—entered into a contract to sell Norfolk approximately $150,000 worth of Viagra, Propecia, and Xenical. Pet. App. 3a. Petitioner shipped the drugs to Norfolk, but Norfolk did not pay for them, so petitioner retained a security interest and title in the drugs. See *id.* at 3a, 50a-51a. On August 7, 2000, the United States executed a search warrant at Norfolk's facilities and seized some or all of the drugs that petitioner had shipped. *Id.* at 3a, 21a.

2. On October 2, 2000, petitioner filed a motion in the United States District Court for the Middle District of Alabama—the court in which the criminal prosecution was pending—seeking an order requiring the government to return the seized drugs. Pet. App. 5a. Petitioner asserted that, because the drugs might expire and become nonsaleable while in government custody, it was entitled to their immediate return. *Id.* at 5a, 22a. The government filed a response, explaining that the motion should be governed by Rule 41(e) of the Federal Rules of Criminal Procedure, which provided a mechanism for seeking the return of seized property but allowed the court to "impose reasonable conditions to protect access

to the property and its use in later proceedings."[1] *Id.* at 22a. The government opposed petitioner's motion, arguing that the drugs were needed for use as evidence at the trial of Yates and Pusztai, and it noted that the drugs' expiration dates were more than a year after the scheduled trial date. *Id.* at 22a-23a.

In January 2002, after supplemental filings and a hearing, the magistrate judge recommended denial of the motion for return of the property. Pet. App. 4a, 32a-33a. The magistrate judge concluded that the motion was governed by Rule 41(e), and that petitioner was not entitled to return of the property at issue because it had failed to demonstrate that (1) the drugs were likely to expire before the conclusion of the criminal trial; (2) petitioner would suffer irreparable harm if the government retained the drugs for possible use at trial; (3) petitioner was the actual owner of a large portion of the

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[1] In 2000, Rule 41(e) read in its entirety as follows:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Fed. R. Crim. P. 41(e) (2000). Rule 41(e) has since been rephrased and moved to Rule 41(g). See Pet. App. 22a (reprinting the current text of Rule 41(g)).

drugs it sought;[2] or (4) petitioner lacked an adequate remedy at law. *Id.* at 6a, 33a. Petitioner did not file any objections to the recommendation, and the district court adopted it, denying petitioner's motion for return of the property. *Id.* at 33a-34a.

Petitioner also brought a separate civil action against Norfolk for breach of contract in the United States District Court for the Northern District of West Virginia. Pet. App. 26a, 33a. In August 2002, the district court in that suit entered a default judgment in petitioner's favor and awarded petitioner damages of $208,070.12, representing the unpaid invoice price for the drugs plus attorneys' fees and interest. *Ibid.*[3]

During the criminal trial, the government did not ultimately use the seized drugs as evidence. Pet. App. 24a. Yates and Pusztai were convicted, and they were sentenced in June 2002. *Ibid.* When they appealed, the government retained possession of the drugs for use in a potential retrial. *Id.* at 25a. After protracted appellate proceedings, including en banc review, the Eleventh Circuit reversed and remanded for a new trial, based upon its finding that the district court's decision to allow two prosecution witnesses to testify by video teleconference violated the Confrontation Clause of the Sixth

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[2] Petitioner does not explain the discrepancy between its contention that "[t]he Government confiscated hundreds of boxes of pharmaceuticals shipped by petitioner" (Pet. 20) and its March 8, 2001, response in the Rule 41(e) proceeding, which claimed ownership of only ten boxes of Viagra among the property in the government's possession (Gov't CFC App. 27, 43-44).

[3] In its complaint in the current case, petitioner asserted that it "could not collect on its judgment against Norfolk because Norfolk had ceased its operations and had no assets." Compl. ¶ 41. It has not explained whether it could have sought to collect from Yates or Pusztai.

Amendment. See *United States* v. *Yates*, 391 F.3d 1182 (2004), vacated, 404 F.3d 1291 (2005); *United States* v. *Yates*, 438 F.3d 1307 (2006) (en banc). In November 2006, four months after the court of appeals issued its mandate, Pusztai and Yates pleaded guilty. Pet. App. 25a. By that time the drugs had expired. *Ibid.*

3. In April 2004, petitioner initiated the current case by filing suit against the United States in the Court of Federal Claims. Pet. App. 27a. Petitioner alleged that, by seizing drugs that still belonged to petitioner, the government had deprived petitioner of its property without just compensation, in violation of the Fifth Amendment. *Id.* at 20a. The United States moved to dismiss the case, arguing that when the government seizes property to be used as evidence in a criminal proceeding, the seizure is an exercise of the government's police power and therefore is not a Fifth Amendment taking. *Id.* at 20a, 27a. In an unpublished opinion, the CFC held that a valid exercise of the government's police power is not a compensable taking. No. 04-610C, 2005 WL 6112630 (Fed. Cl. Nov. 15, 2005). The CFC denied the government's motion to dismiss without prejudice, however, because it was unable to determine from the pleadings whether the government had satisfied a standard of reasonableness in seizing the drugs. *Id.* at *3-*5.

In 2006, the government submitted a second motion to dismiss, including documents and a declaration that described the prior Rule 41(e) proceedings in the criminal case. Pet. App. 27a-28a. The CFC treated the motion as one for summary judgment, *id.* at 28a, and concluded that "[t]he ability of federal prosecutors to deprive property owners of certain items in order to secure justice and a fair trial for a criminal defendant is a

legitimate and traditionally accepted exercise of the police power. Accordingly, it is by definition not a compensable taking." *Id.* at 41a. The court held that the Rule 41 procedure rather than a takings suit provides the appropriate mechanism for challenging government seizures of property in this context, *id.* at 41a-42a, and it entered judgment in favor of the government, *id.* at 42a.

4. The court of appeals affirmed. Pet. App. 1a-18a. The court relied primarily on *Acadia Technology, Inc.* v. *United States*, 458 F.3d 1327 (Fed. Cir. 2006), which held that the legitimate exercise of the government's police power in seizing property as part of law-enforcement activities has not traditionally required the payment of compensation to the owner pursuant to the Fifth Amendment. Pet. App. 10a.

The Federal Circuit also relied in part (see Pet. App. 11a-12a) on this Court's decision in *Bennis* v. *Michigan*, 516 U.S. 442 (1996). The Court in *Bennis* rejected a takings claim filed by the co-owner of a car that had been forfeited to the State because the co-owner's husband, unbeknownst to her and without her permission, had used it to engage in sexual activity with a prostitute. *Id.* at 452-453. The Court held that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.* at 452. And in applying that principle, the Court refused to distinguish between "co-owners who are complicit in the wrongful use of property" and "innocent co-owners." *Id.* at 453. In light of *Bennis*, the Federal Circuit concluded that "the [takings] inquiry remains focused on the character of the government action, not the culpability or innocence of the property holder." Pet. App. 11a.

ARGUMENT

The court of appeals correctly held that the government was not required to compensate petitioner for the seizure of its pharmaceuticals for use as evidence in a criminal trial when that property, although owned by petitioner, was inventory in the possession of others who were engaged in the illegal sale of such drugs. Petitioner contends that the government must effectively purchase—or rent, if its rule is to extend to temporary takings—any lawfully seized evidence that it seeks to use in a criminal trial if that evidence is owned by an "innocent" party. That argument has no basis in tradition, practice, or case law, and petitioner identifies no conflict between the decision below and any other appellate ruling. Further review is not warranted.

1. The government's seizure and retention of petitioner's property for use as evidence in a criminal proceeding did not effect a compensable taking under the Fifth Amendment.

a. Petitioner contends (Pet. 12) that "[t]he court of appeals articulated a stark dichotomy between actions taken under the police power (for which compensation is not due) and actions taken under the eminent domain power (for which compensation is due)." Although isolated language in the Federal Circuit's opinion (see Pet. App. 10a) might suggest a broad rule along those lines, the court's ultimate holding was more limited. The court did not purport to address all applications of the police power, but only "the government's ability to seize and retain property to be used as evidence in a criminal prosecution." *Id.* at 9a; see *id.* at 11a ("In the instant case, the government seized the pharmaceuticals in order to enforce criminal laws."); *id.* at 18a (explaining that the government had "seized the drugs as part of a criminal

prosecution"). In addition, the court limited its holding to law-enforcement seizures that comply with due process requirements, as shown by a district court's determination under Federal Rule of Criminal Procedure 41 that the balance of the equities between the government and the property owner justifies the government's seizure and retention of the property. *Id.* at 13a. Thus, the court properly focused on the "character of the government action" (*id.* at 14a) rather than simply on its status as an exercise of the police power.

This Court has made it clear that an exercise of the police power may or may not constitute a taking, depending on the character of the action. For instance, an action taken to remove a blight or nuisance may be characterized as an "application of the police power to municipal affairs," see *Berman* v. *Parker*, 348 U.S. 26, 32 (1954), but a government may choose to use eminent domain or forfeiture (among other tools) to advance that police-power purpose. In *Bennis* v. *Michigan*, 516 U.S. 442 (1996), the Court explained that a lawful exercise of the forfeiture power will not simultaneously be a compensable taking, even if it is done for the purpose of eliminating a public nuisance associated with prostitution (a classic use of the police power). *Id.* at 452. The same is true here, where a lawful seizure of evidence for use in the criminal-justice process does not effect a compensable taking.

The Court has also stated that background legal principles help to define the circumstances under which property is "enjoyed under an implied limitation and must yield to the police power" without triggering compensation. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922)). As the Court

explained in *Lucas*, "[i]n the case of personal property, * * * the State's traditionally high degree of control over commercial dealings" creates the "possibility that new regulation might even render [an owner's] property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Id.* at 1027-1028. In the current case, petitioner's ownership of the seized drugs was subject to its obligation to provide evidence in criminal matters if called upon to do so. As Professor Wigmore put it:

> For more than three centuries it has now been recognized as a fundamental maxim that the public * * * has a right to every man's evidence. * * * [I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded.

8 John Henry Wigmore, *Evidence* § 2194, at 70-72 (John T. McNaughton rev. 1961); see *Hurtado* v. *United States*, 410 U.S. 578, 589 n.10 (1973) (quoting part of the passage from Wigmore); cf. *id.* at 588-589 (holding that, in the context of testimony from a material witness, "the Fifth Amendment does not require that the government pay for the performance of" the "public obligation to provide evidence," and that the "obligation persists no matter how financially burdensome it may be," because "[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public") (citation and internal quotation marks omitted).

b. Some of petitioner's articulations of its proposed constitutional rule (*e.g.*, Pet. 10, 12, 14) suggest that, with the possible exception of property subject to forfei-

ture (Pet. 15-16), any "forcible seizure of tangible property" or "physical occupation" of property falls within the "core" of the Just Compensation Clause. Petitioner elsewhere indicates (Pet. i, 7, 8), however, that its status as a purportedly "innocent third party" is crucial to its Fifth Amendment claim. But, as the court of appeals pointed out (Pet. App. 12a), this Court in *Bennis* squarely held that the distinction between "complicit" and "innocent" owners does not control the takings inquiry when personal property is lawfully seized by means other than the exercise of eminent domain. 516 U.S. at 453.

Contrary to petitioner's suggestion (Pet. 15-16), the rule announced in *Bennis* was not limited to forfeiture cases. Instead, the Court stated more generally that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." 516 U.S. at 452. Petitioner observes (Pet. 16) that the government in the current case "never lawfully acquired title" to the seized pharmaceuticals. The court of appeals correctly recognized (Pet. App. 12a), however, and petitioner does not dispute, that the government acquired lawful *possession* of Norfolk's inventory of prescription drugs through its exercise of law-enforcement authority to seize the property as evidence. The fact that the government did not also acquire *ownership* of the drugs cannot reasonably be thought to *strengthen* petitioner's contention that the government has "taken" its property.

c. Petitioner suggests (Pet. 19 n.14) that requiring compensation for lawful law-enforcement seizures of innocent owners' property for use as evidence would

guard against "arbitrary behavior by federal officials." But the Federal Circuit's decision—which relied on an antecedent judicial determination under former Rule 41(e) that the property in question had been validly seized and could reasonably be retained—is better tailored to limit abusive behavior than petitioner's proposed blanket requirement (Pet. 20) that the government pay for *all* seizures of evidence that is owned by third parties. Moreover, the unpredictability of the government's need for evidence, combined with the availability of Federal Rule of Criminal Procedure 41(g) to prevent potential abuses, ensures that such seizures will not be the product of redistributive impulses or arbitrary or tyrannical treatment. And because the government and the public could not ordinarily expect to derive an economic benefit from the seizure of evidence, a compensation requirement is unnecessary to deter use of such seizures as a means of financing government operations.

2. Petitioner identifies no conflict in authority on the question presented here.

a. Petitioner contends (Pet. 23) that the Ninth and Tenth Circuits "would reject the reasoning of the court below in a case properly before them." The cases on which petitioner relies do not support that assertion. In *Lowther* v. *United States*, 480 F.2d 1031 (1973), the Tenth Circuit found that compensation was available because the government had "acted contrary to law in seizing the property." *Id.* at 1035. In *United States* v. *Martinson*, 809 F.2d 1364 (1987), the Ninth Circuit remanded for further fact-finding but made clear that the movant would be able to recover only if he could prove "that the seizure was illegal." *Id.* at 1369. Accordingly, there is no conflict between those decisions and this one,

in which the Federal Circuit denied compensation for the *legal* seizure of the unsold drugs in Norfolk's inventory. Pet. App. 12a-14a. The Fifth Circuit has likewise rejected petitioner's basic argument, holding that the Just Compensation Clause "is not implicated by the legal seizure of property pursuant to a criminal investigation." *Dickens* v. *Lewis*, 750 F.2d 1251, 1255 (1984); see *Scott* v. *Jackson County*, 297 Fed. Appx. 623, 626 (9th Cir. 2008) (affirming dismissal of takings claim when plaintiff "never alleged that her property was taken or retained for any reason other than for law enforcement purposes").[4]

b. Petitioner suggests (Pet. 21-22) that the absence of a circuit conflict is of little significance because this case comes from the Federal Circuit, which has "exclusive jurisdiction to review [t]akings claims against the United States." But because takings claims may also be brought against state and local governments, see *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 241 (1897), there is no barrier to consideration by

[4] At least two state-court decisions are to similar effect. See *Eggleston* v. *Pierce County*, 64 P.3d 618, 622-623 (Wash. 2003) (applying just compensation provision in the Washington state constitution, described as providing "greater protection" in "some ways" than the Fifth Amendment; holding that law enforcement officials' seizure of a load-bearing wall for use as evidence from a homicide scene, which rendered the innocent owner's home uninhabitable, was not a compensable taking because "[t]he gathering and preserving of evidence is a police power function"); *Emery* v. *State*, 688 P.2d 72, 74, 77, 79-80 (Ore. 1984) (applying just compensation provision in the Oregon state constitution, which is "identical in language and meaning" to the Fifth Amendment; holding that the dismantling of a pickup truck seized as evidence in a murder case, which was owned by an innocent third party, was not a compensable taking) (citation omitted). Petitioner identifies no state-court authority for the proposition that seizures of personal property for use as evidence in a criminal case effect a compensable taking.

other federal and state courts of takings claims based on seizures of property for use as evidence.[5] State and local governments engage in law enforcement and—as petitioner acknowledges (Pet. 18)—have been authorized for decades to seize items that are "mere evidence," rather than the instrumentality or fruit of a crime. *Warden* v. *Hayden*, 387 U.S. 294, 300-310 (1967).

Bennis involved an alleged taking by the State of Michigan, and it (like many of the other takings cases that petitioner cites) was heard on a writ of certiorari to a state court. 516 U.S. at 443-446; see *Kelo* v. *City of New London*, 545 U.S. 469 (2005); *Lucas*, *supra*; *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988); *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978). Takings suits against States can also come to this Court from the regional federal courts of appeals. See, *e.g.*, *Brown* v. *Legal Found.*, 538 U.S. 216 (2003). The Federal Circuit's broad jurisdiction over takings claims against the United States therefore provides no sound reason for this Court to grant review in the absence of a conflict in authority.

c. Finally, even if the question presented by the petition otherwise warranted this Court's review, the facts here are idiosyncratic, belying petitioner's claim (Pet. 14 n.10) that this case "present[s] the problem in the clearest possible context." At the time of the initial seizure, and at the time petitioner's Rule 41(e) motion was liti-

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[5] The lack of exclusive jurisdiction over the issue distinguishes this case from the patent-infringement cases petitioner cites. See Pet. 22 (citing *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83 (1993)).

gated, there was no basis for concluding that the seizure had deprived petitioner of the entire value of the seized drugs. That economic consequence did not occur until a considerably later (though indeterminate) time, as the expiration dates for the drugs drew near and the appeal in the criminal case remained pending. Even if a lawful seizure of property for evidentiary use could under *some* circumstances ripen into a taking, resolution of this case could turn on the identification of the party responsible for initiating a new Rule 41 proceeding when the economic consequences of an initial seizure become unexpectedly severe.[6] The Court's consideration of this supposedly clear case therefore would not serve petitioner's stated objective (Pet. 20) of creating a "salutary incentive" for the government "to act with reasonable consideration of the costs" of implementing a prosecutorial decision to "confiscate[] property from innocent third parties as mere evidence."

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[6] The lack of clarity about when petitioner was deprived of its entire property interest is further complicated by its outstanding judgment against Norfolk, for the *full* value of all of the drugs petitioner shipped (not just those it could identify among the inventory seized by the government). See p. 4 & notes 2-3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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